STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

DANIELLE L. DAVIS and DAVIS PREPARATORY ASSOCIATION CORPORATION,

Plaintiff,

-vs-

ROBERT MURDOCK, SR., ROBERT MURDOCK, JR. and RGM LAND AND DEVELOPMENT CORPORATION

Defendants.

Case No: 17-016845-CB
HON. BRIAN R. SULLIVAN

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY DISPOSITION

At a session of said Court, held in the City County Building, City of Detroit, County of Wayne, State of Michigan, on 8/27/2019

PRESENT: HONORABLE BRIAN R. SULLIVAN

The issue in this case is whether plaintiffs (Danielle L. Davis and Davis Preparatory Association Corporation, "Davis") are entitled to specific performance of an option to purchase a school building and property contained in the lease between plaintiffs and defendants. Defendants (Robert Murdock, Sr., Robert Murdock, Jr. and RGM Land Development Corporation, "Murdock") refused to sell the property to Davis on the ground the purchase price in the lease was incorrect. Murdock contends the stated price failed to

include amounts due to him for consulting services performed for the plaintiff school and an IRS lien.

The court heard oral argument and continued the motion for a month so defendants could present additional evidence to the court. The court has examined all the materials provided by the parties. The court grants plaintiffs' motion for summary disposition for specific performance for conveyance of the property by defendant to plaintiff pursuant to the contract, and grants plaintiffs' motion for summary disposition on defendant's claim for a consulting fee on the ground that there is no genuine as to any material fact that the plaintiff does not owe defendant a consulting fee, nor money for defendant's IRS lien.

FACTS

Plaintiff Davis is an owner/operator of a private pre-school/kindergarten school in Detroit. Defendant Murdock used to operate a similar school at the same location (21325 through 55 West Seven Mile Road in the City of Detroit, County of Wayne, State of Michigan) where plaintiff now operates, but Murdock lost his license to operate a school.

Davis and Murdock have known each other since 1996. In June, 2013 the parties discussed the sale of the property from Murdock to Davis. Murdock told Davis: 1. Murdock had several federal (IRS) tax liens; 2. Murdock wanted to lease the school property (Metropolitan Academy); 3. Murdock lost the school on August 20, 2013; 4.

Murdock would lease the property to Davis with an option to purchase the building; and property; 5. Murdock leased the building to plaintiff on June 27, 2013 by written lease; 6. The lease gave plaintiff an option to purchase the building and the property; 7. Davis timely exercised the option, five times, but defendant did not sell the property to plaintiff.

Murdock had licensing problems with the State of Michigan. Murdock was allowed to maintain a financial interest in the building but was not allowed to have contact with the children in the school.

The lease required Davis to pay $2,500.00 a month for the building and its contents. That lease also contained an option to purchase the building and property which had to be exercised before October, 2015.

It is undisputed Davis paid the rent. After the first year of the lease Davis exercised her option to purchase the building under paragraph 12 of the lease, which provides:

> 12. Provided the Tenant is not currently in default in the performance of any term of this Lease, the Tenant will have the *option to purchase* (21355 W. Seven Mile Road and 21325 W. Seven Mile Rd., Detroit, MI 48219) at *agreeable amount of $96,000.00 less any taxes paid on property* will constitute as the down payment toward the property. (Emphasis supplied).

Other pertinent paragraphs of the lease provide:

> 5. The term of the Lease is a periodic tenancy commencing at 12:00 noon on June 27, 2013 and continuing on a year-to-year basis until the building is sold to Tenant. Landlord agrees to sell the building to Davis Preparatory Association and Danielle L. Davis after one year.

16d. "the parties made no other representations or warranties not set forth in the lease."

Murdock acknowledged plaintiff exercised the option to purchase and he signed a purchase agreement but refused to close. Defendant said he needed to resolve his federal tax issue. In the meantime, plaintiff paid $34,431.75 in back taxes Murdock owed on the property to forestall any foreclosure.

The parties entered into (executed) four subsequent real estate purchase agreements, all of which were identical in nature. Each agreement made reference to the Murdock's successful negotiation or settlement of his IRS lien, which was attached to the property. The agreements were dated January 25, 2016, March 21, 2016, January 20, 2017, June 8, 2017 and October 6, 2017. All the agreements contained the following provisions:

> Entire Agreement. The parties agree that this purchase agreement contains the entire agreement between the seller and the buyer and that there are no agreements, representations, statements or understandings that the parties have relied on that are not stated in this purchase agreement.
>
> All agreements in writing; The parties agree that the purchase agreement (and its written and signed addenda, if any) may not be modified without a writing that is signed or initialed by both the seller and the buyer.

There were also written addendums to each purchase offer agreed upon and signed by the parties. For instance, on June 8 there was an addendum that referenced the

financing, defendants IRS lien and earnest money deposit. The last addendum was dated October 18, 2017.

A commitment of title was obtained on August 31, 2017. However, the defendant refused to convey the property and refused to attend the scheduled closing. In short, defendant refused to close. Finally, Davis filed suit for specific performance to enforce the sale. Defendant filed a counter-claim for unjust enrichment, rescission, fraud and misrepresentation.

Plaintiffs assert there is no genuine issue as to any material fact that the plaintiff had a valid option to purchase the real estate in the lease contract, that the defendant accepted her offer, signed the agreement and then illegally refused to perform. Plaintiff contends she is entitled to judgment as a matter of law. Plaintiff also claims defendant's counter-claim that she owes defendant a consulting fee or agreement to pay his IRS lien is meritless.

STANDARD OF REVIEW

A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a party's claim. See *Maiden v Rozwood*, 461 Mich 109 (1999). When a court reviews a motion brought pursuant to this sub-rule the court must examine all documentary evidence presented to it such as depositions, pleadings, affidavits, etc.

Maiden, supra. The court must draw all reasonable inferences in favor of the non-moving party and take the facts in a light most favorable to the non-moving party in determining whether a genuine issue of material fact exists. See *Dextrom v Wexford Company*, 287 Mich App 406 (2010). Summary disposition is proper when the evidence fails to establish a genuine issue of material fact. In such a circumstance the moving party is entitled to a judgment as a matter of law. See *West v General Motors Corp.*, 469 Mich 177 (2003). A genuine issue of material fact exists when the record, giving the benefit of a reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds may disagree. *West, Id*. *Rice v Auto Insurance Association*, 252 Mich App 25 (2002); *Ward v Franks Nursery and Crafts, Inc.*, 186 Mich App 120 (1990). If the proffered evidence fails to establish a genuine issue regarding any material fact the moving party is entitled to judgment as a matter of law. See MCR 2.116(C)(10), (G)(4); *Quinto v Cross and Peters Company*, 451 Mich 358 (1996).

A motion under sub-rule (C)(10) must specifically identify the issues to which the moving party believes there is no genuine issue as to any material fact. The adverse party may not rest on mere allegations or denials in the pleadings but must, by affidavit or otherwise, set forth specific facts showing there is a genuine issue of fact for trial. See MCR 2.116(G)(4); *SSC Associates Limited Partnership v General Retirement System of the City of Detroit*, 192 Mich App 360 (1991).

A party's pledge to establish an issue of fact at trial cannot survive summary

disposition under (C)(10). *Maiden*, 461 Mich at 121. The court rule requires the adverse party to set forth specific facts at the motion showing a genuine issue for trial. The reviewing court must evaluate the motion by considering the substantively admissible evidence proffered in support and opposition of the motion. *Maiden*, 461 Mich at 121; *McCart v J Walter Thompson USA, Inc.*, 437 Mich 109, 115, note 4 (1991).

DISCUSSION

Discovery closed on January 8, 2019. Discovery was originally set to close on October 9, 2018 but the court extended discovery for ninety days. Plaintiff served Interrogatories and Request to Produce Documents on defendant. Defendant did not answer nor object to them. Plaintiff filed a motion to compel answers. Defendant was ordered to produce answers by January 15, 2019. Defendant did not do so. Plaintiff noticed defendants' deposition. The defendant did not appear for his deposition. A subpoena was issued for the defendants accounting firm for the production of documents. Defendant never complied with that subpoena and the documents were not produced.

Case evaluation was scheduled for March 19, 2019. Neither Robert Murdock, nor counsel for the corporate defendant appeared.

Plaintiff claims there is no genuine issue as to any material fact that it had a valid option contract with the defendant that defendant breached the contract by failing to honor

the option to purchase – five times. Plaintiff seeks specific performance for the sale of the property so she can operate a school on the premises.

The court concludes that: 1) the parties entered into a lease agreement for the property in June, 2013; 2) there were numerous (5) purchase agreements entered into between the plaintiff and the defendant, all essentially the same, for defendant to sell plaintiff the property pursuant to a written option to purchase; 3) no writing has been produced by the defendant in discovery or in response to plaintiffs motion that the plaintiff and defendant ever had a contract for defendant's consulting (or any other) services; 4) the plaintiff had a valid option to purchase timely exercised by plaintiff in October, 2015, after one year of occupancy; 5) the plaintiff properly exercised the option to purchase; 6) the defendant included in the agreement for purchase of real estate specific language about his IRS lien and that financing was important to him; and 7) the parties agreed that plaintiff could purchase the property at the agreed upon price of $96,000.00 less taxes paid by plaintiff; and 8) the defendant failed to perform.

The court concludes: 1) the parties entered into a valid lease with a valid option to purchase the property by plaintiff from the defendant; 2) that the plaintiff validly exercised her option to purchase; and 3) the defendant refused to perform without legal reason.

1. Option to purchase, defendant's breach of contract.

The elements of a contract are:

1. Parties competent to contract;

2. A proper subject matter;

3. Legal consideration;

4. Mutuality of agreement; and

5. Mutuality of obligation. *AFT Mich v Michigan*, 497 Mich 197, 235 (2015); *Bank of America, NA v First American Title Insurance Company*, 499 Mich 74 (2016).

Parties to a contract are free to modify or waive any rights and duties established by their contract. *Quality Products and Concepts Company v Nagle Precision, Inc.*, 469 Mich 362, 372 (2003). Such modification or waiver must be established by clear and convincing evidence that the parties mutually agreed to a modification or waiver of their contract. *Quality Products, supra*. However, no party can unilaterally alter an existing bilateral contract. *Quality Products, supra*. The party alleging such modification or waiver must establish it was the mutual intention of the parties to waive or modify that contact, a necessary requirement of mutual assent. *Quality Products, supra*.

In order prevail on a breach of contract claim the plaintiff must establish by a preponderance of the evidence: 1) there was a contract; 2) the defendant breached that contract; and 3) the breach resulted in damages to the plaintiff. See *Bank of America, NA v Fidelity National Title Insurance Company*, 316 Mich App 480 (2016).

The interpretation of a contract is ordinarily a matter of law, provided there is no ambiguity in the contract. See *Reinforced Concrete Co. v Boyes*, 180 Mich 609 (1914).

There is no ambiguity, latent or otherwise in this contract. Rather, defendant submits the parties had a hidden or private side oral agreement between themselves that the purchase price be greater than that stated in the written offer. Defendant has presented no evidence to support this claim.

Finally, defendants have had five opportunities in the five separate lease and purchase agreements to articulate this agreement, and did not. Moreover, there were addendums to each of the five contracts which gave defendant more opportunity to indicate the nature or terms of the actual agreement as he contends, but he did not do so.

The interpretation of a contract has a goal to give effect to the party's intent at the time they entered into the contract. *Miller-Davis v Ahrens Constr, Inc.*, 495 Mich 161, 174 (2014). The party's intent is determined by interpreting language of the contract according to its plain and ordinary meaning. *Ahrens, supra*. If the language is unambiguous the contract must be enforced as written. I*n Re: Smith Trust*, 480 Mich 19, 24 (2008).

The basis for defendant's assertion was that the value of the property as shown by the city assessment was greater than that contained in the purchase price. Defendant claims that is evidence that the value was really skewed low to compensate him for consulting services and tax liens.

The contract which defendant signed and in which he inserted custom language

about his IRS obligation and financing also provides that the written agreement constitutes the entire agreement, unless it is amended in writing. See *UAW GM Human Resource Center v KSL Recreation Corporation*, 228 Mich App 486 (1998). There is no question the parties amended the contract by written addenda. There is no mention of any money consulting service or different purchase price in any contract or any amendment.

Moreover, while the parties are free to amend a written contract orally or by course of conduct, such an amendment must be supported by evidence. See *Quality Products and Concepts Co. v Nagel Precision, Inc.*, 469 Mich 362 (2003). This court continued the original motion for about thirty days during argument for the defendant to collect and present any evidence to that effect, but the defendant presented nothing. In short, defendant's response to plaintiffs motion for summary disposition pursuant to MCR 2.116(C)(10) that there is no genuine issue as to any material fact that the option contract is valid and enforceable, was that defendant acknowledged the existence and the validity of the written contract(s), but contends the purchase price was low. Defendant has presented no evidence to support any such modification of the contract. See *Quality Products, supra*.

A written contract can be modified or waived even if it contains a written provision against such modifications so long as there is mutual agreement to do so. But it cannot be amended unilaterally. The party alleging such a modification must demonstrate by clear and convincing evidence, vis a vis writing, oral or affirmative conduct, that such an

amendment has occurred. *Quality Products, supra*. In this instance, defendant has provided no such evidence.

The defendant did present an e-mail where the plaintiff asked for defendant's opinion as to certain school matters. But nothing in any of these documents, or any evidence provided to the court (during oral argument or after the continuance of the motion) by defendant amounts to a modification or a waiver by either party.

The interpretation of a contract is ordinarily a matter of law, provided there is no ambiguity in the contract. See *Reinforced Concrete Co. v Boyes*, 180 Mich 609 (1914). There is no ambiguity, latent or otherwise in this contract. Defendant has presented no evidence to support the claim the parties had an unwritten side agreement that the purchase price be greater than that stated in writing.

Plaintiff has demonstrated the existence of a valid contract with a valid option to purchase. Plaintiff has performed. Defendants have offered no evidence to support its theory that the purchase price is inadequate because it fails to include his consulting service and liens. Defendant has not presented no agreement, no invoice, no bill, no affidavit or any witness testimony to support his contention that the parties had a side agreement or a private agreement to increase the purchase price to reflect the amount plaintiff owes for the property, which includes liens and consulting service fee. Moreover, defendant has never stated what that fee is.

The undisputed evidence shows the plaintiff paid $159,775.00 in lease payments; $49,757.90 in maintenance repairs to the property; $63,599.97 in defendants property taxes; $6,993.00 in insurance costs, $46,351.54 in accounting fees; $1,759.00 in city inspection fees and $20,735.00 for a play structure added to the property.

Defendants defense and counter-claim that plaintiff agreed to pay him an unwritten consulting fee is unsupported by any evidence, contradicts the four real estate purchase agreements and addendums entered into by the parties on four different occasions, and is contrary to the express language of each of the agreements.

Plaintiff also moved for summary disposition on plaintiff's counter-claim for unjust enrichment, rescission, fraud and misrepresentation.

2. Unjust Enrichment

Unjust enrichment is shown where a plaintiff receives a benefit from defendant and the plaintiffs' retention of that benefit would be inequitable. See *Mull v Wayne County*, 332 Mich 274 (1952); *MEEMIC v Morris*, 460 Mich 180 (1999). The burden of proof is on the party claiming detrimental reliance. See *Adams v ACIA*, 154 Mich App 186 (1986); *Levte v Bird,* 277 Mich 27 (1936).

Unjust enrichment is an equitable remedy, a "quasi-conduct." Where a contract

exists which covers the same subject matter, unjust enrichment will not be found to lie. Unjust enrichment is a remedy used to imply a contract to prevent injustice. In this instance there is a contract covering the subject matter, the sale of the property and school. Defendant's count of unjust enrichment must be dismissed. *Kammer Asphalt Paving v East China Twp. Schools*, 443 Mich 176 (1993); *Hoyt v Paw Paw Grape Juice Co.*, 158 Mich 619 (1909).

3. Rescission

Defendant seeks rescission of the lease agreement on the basis that the parties agreed counter-defendant's federal tax obligation would be satisfied. Counter-plaintiff further alleges that the amount of the purchase price must have been sufficient to satisfy his tax indebtedness. However, the contract language does not support this interpretation and the plain language of the purchase agreement is clear. Defendant has presented no evidence to support his proposition that the real agreement between the parties was not the written contract but that he was to be paid amounts sufficient to satisfy his tax obligation. The language of the sale contract states the contrary. That language goes to the timeliness of the payment only. The remedy is that of voiding the contract at the seller's option.

Plaintiffs' motion for summary disposition on the count of rescission is granted because the parties have a valid and enforceable written contract and there is no basis to rescind that valid contract.

4. Fraud and Misrepresentation

Defendant also alleges fraud and misrepresentation for his professional services including "management of the school, keeping all of the books and records, obtaining licenses and grants and acting as a consultant, without compensation of reasonable value." See counter-complaint, paragraph 34. Contrary to defendants assertion there are no specific promises or representations cited or alleged. The State of Michigan precluded Murdock's participation in the school because he lost his license. Finally, the court finds no basis in evidence to conclude defendant relied on any assertion of plaintiff (none have been stated) especially when four purchase agreements were entered into by the same parties and none of them support defendant's position, even though all are executed over about a years' time. Defendant does not say what the misrepresentation (fraud) is or how he or whether he relied on them. Plaintiff's motion on these counts is granted.

CONCLUSION

Plaintiff has provided evidence of a valid contract to purchase the property, timely executed with the ability to perform through the payment of rent, taxes, repairs, etc. Defendant has produced no evidence to the contrary. Plaintiff's motion for summary disposition as to defendants counter-claim for unjust enrichment, rescission, fraud and misrepresentation is granted; and

IT IS SO ORDERED.

/s/ Brian R. Sullivan 8/28/2019

BRIAN R. SULLIVAN
Circuit Court Judge

ISSUED: